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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

BARBARA GRUTTER,
Petitioner

v.

LEE BOLLINGER, et. als.
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMICUS CURIAE THE MASSACHUSETTS SCHOOL OF LAW IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICUS CURIAE[1]

1. The Massachusetts School of Law ("MSL") takes no position on the outcome of this case. MSL submits this amicus brief solely to assist the Court in understanding why law schools have found it necessary to use affirmative action in their admissions practices in order to enroll minority students. We emphasize that affirmative action has been considered necessary because use of the LSAT as a major tool of law school admissions – indeed as *the* major tool of law school admissions -- results in a decreased pool of "qualified" minority applicants and in reduced admissions of minorities. We also briefly discuss other practices that decrease the pool of minority applicants. The facts we present can appropriately be considered relevant, on one side and the other, to the question of whether a compelling state interest supports the use of affirmative action by law schools and to whether, as a general matter, affirmative action is tailored to provide racial minorities with legal education and entrance into the profession.

2. MSL, located in Andover, Massachusetts, has been in existence since 1988. Licensed after thorough inspection by law professors and deans acting for the Commonwealth of Massachusetts, and accredited and reaccredited after similarly thorough inspections by the New England Association of Schools & Colleges, MSL is generally regarded as the country's most prominent school not accredited by the American Bar Association's accrediting arm, called the Council of the Section of Legal Education ("the Section of

[1]Consents to file amicus briefs have been filed in this Court by all parties. This brief was not authored by counsel for any party, in whole or in part, and no person or entity other than amicus curiae and its counsel have made a monetary contribution to the preparation or submission of this brief.

Legal Education"). MSL has graduated over 1,500 students, most of whom have remained in the New England states to practice law, but some of whom practice in such states as California, New York and Maryland.

3. MSL was founded, and is dedicated, to providing legal education to racial and ethnic minorities, members of the working class, immigrants, and persons in mid-life. It was thus founded and is devoted to providing education to persons who, as shown in this very case with regard to minorities, were not and are not receiving legal education in sufficient numbers. Being founded for this purpose, MSL has a deep interest in cases in which efforts to provide legal education to minorities are at issue, and has spent thousands of hours studying issues and facts relevant to this. Because of its constant study of these matters, it has expertise which it believes may prove helpful to the Court.

4. The type of affirmative action practiced by the University of Michigan Law School, and at issue in this case, is one that has been necessitated in significant part by the numbers-oriented admissions tools used by most law schools, especially the schools' heavy focus on the LSAT. Perhaps no other tool used in graduate school admissions has come under such attack in recent years as the LSAT, which for many decades has been the only admissions test approved by the ABA's Section of Legal Education. Because MSL uses a "holistic" approach to admissions, not a by-the-numbers approach, and does not rely in any way on the LSAT or any other standardized test, it does not need to use affirmative action in order to enroll qualified minority students. Rather, it considers a variety of factors when determining whether to admit a candidate, but race is not a "plus" or special factor in admissions decisions. In fact, MSL's admissions committee generally is not even aware of the race of an applicant. Yet MSL's minority enrollments are generally higher, year after

year, than those of scores of the predominantly white ABA accredited schools. This is true even though New England has a low percentage of minorities, and a low percentage of minority college graduates, in comparison with such sections of the country as the Mid-Atlantic States, the South, and the industrialized upper Midwest where the instant case originates, and in comparison with major urban areas such as New York City, Chicago and Los Angeles, which are home to millions of minority citizens and to many law schools.

5. Over the course of the last 15 years, MSL's personnel have collectively spent thousands of hours researching, writing about, and dealing with diversity in legal education. They have developed special expertise that complements their deep interest in the subject. At many points their views do not coincide with those commonly expressed by "official" and "semi-official" spokesmen for legal education such as the ABA. For these reasons, and also because it has achieved diversity without taking applicants' race into consideration in the admissions process, MSL can provide the Court with a different perspective on racial, ethnic, and economic diversity in legal education than is being presented by the parties or by other amici.

6. There are two areas in particular in which MSL can assist the Court. First, it can provide information on the law schools' rules and practices, particularly the emphasis on the LSAT, that made affirmative action necessary if there was to be diversity at the University of Michigan Law School or at other predominantly white ABA schools. Second, and relatedly, it can address the crucial point, raised by the courts below, of whether law schools' continued heavy reliance upon numerically-driven tools, especially the schools' overwhelming emphasis on the LSAT, as the sine qua non of law school admissions, can be expected to achieve a diverse student body. *Grutter v. Bollinger*, 288 F.3d 732, 749-51 (6th Cir. 2002); 137

F. Supp. 2d 821, 852-53 (E.D. Mich. 2001).

ARGUMENT

A. The Belief That Diversity Is Necessary In Law Schools Because A High Percentage Of American Leaders Are Attorneys.

It is by now widely, but not universally, believed that racial, ethnic and economic diversity in student bodies at institutions of higher education is beneficial both to the academic institutions and to society as a whole. Moreover, it is felt that the need for diversity in law schools and the legal profession is as or more important than in any other field. For it is an undeniable fact that, more than any other profession, lawyers fill the ranks of leadership in this country. The legal profession has supplied more than half of our presidents, more than half of our senators, almost half of our state governors, and more than one-third of our federal congressional representatives.[2] One entire branch of our tripartite federal and state governments -- the judiciary -- is by necessity comprised, with few exceptions, of those trained in the legal profession. Lawyers play a leading role in major public and private

[2]Internet Public Library, *Presidents of the Unites States* <http://www.ipl.org/div/potus/> (accessed Jan. 3, 2003) (A search through the biographies of the 43 presidents reveals that 25 of the 43 presidents were lawyers.); National Governors Association, *Fast Facts on Governors* <http://www.nga.org/governors/1,1169,C_TRIVIA^D_2163,00.html> (accessed Jan. 3, 2002)(23 of 51 governors hold law degrees); Congressional Quarterly, *Vital Statistics on Congress 2000-2001* (In the 107th Congress, 156 of 435 members of the House of Representatives and 53 of 100 members of the Senate held law degrees).

universities, often serving as presidents (as was the case with the former President of the University of Michigan, Lee Bollinger, who headed the University when this case was brought). They often head or are important actors in corporations, are very active in real estate investment, and are major figures in non-profit organizations. To deny minorities access to legal education -- to a major avenue of advancement in American society -- is to deny them the right to fully participate in American life.

B. The Long Exclusion of Minorities From Law Schools.

The history of minority admissions to our nation's law schools and the legal profession is not one of which the legal profession can be proud. For nearly 100 years the ABA, and almost all American law schools accredited by its Section of Legal Education, used rules and practices that *excluded* the groups that are now the subject of affirmative action plans such as the one at issue in this case. Sometimes the exclusion was the specific purpose of those rules and practices; sometimes it was "only" the inevitable result of them. Either way, exclusion was the order of the day for nearly 100 years.[3]

The ABA itself, and its Section of Legal Education, which accredits law schools, were both founded in major part to

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[3]The history of exclusion is discussed in Robert Bocking Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Univ. of North Carolina Press 1987); Jerold S. Auerbach, *Unequal Justice: Lawyers And Social Change In Modern America* (Oxford Univ. Press 1977); Richard L. Abel, *American Lawyers* (Oxford Univ. Press 1989); Susan K. Boyd, *The ABA's First Section* (American Bar Assoc. 1991); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit,* 10 La Raza L. J. 363, 389-395 (1998).

insure the exclusion of "undesirables" from the legal profession. *See* the works cited in n. 3, *supra*. Among the unwanted were Jews, African-Americans, immigrants, Catholics, Italians, Slavs and women. To further insure that only the desired types could enter the legal profession, in the 1920s the Section of Legal Education began accrediting law schools, using rules and policies that excluded institutions, particularly night schools, that served the unwanted groups. *Id.* Over the course of the next fifty years, the ABA persuaded almost all state supreme courts and state boards of bar examiners to permit their bar examinations to be taken only by graduates of exclusionary ABA-accredited schools -- only by graduates, that is, of schools which adhered to rules and practices which, sometimes purposely and sometimes "only" by effect, largely excluded African-Americans.

A major argument used by the ABA in persuading courts and bar examiners to allow bar examinations to be taken only by graduates of schools that adhered to the ABA's exclusionary rules, was that the rules were allegedly essential for high quality legal education and a high quality legal profession. In this very case, however, Michigan points out that its minority graduates -- who would not have been admitted under the *ancien regime* -- have gone on to have successful, productive careers. *Grutter*, 137 F. Supp. 2d at 862-863, David L. Chambers, Richard O. Lempert, Terry K. Adams, *Michigan's Minority Graduates In Practice: The River Runs Through Law School,* 25 Law & Soc. Inquiry 395 (2000).

The exclusionary practices of the ABA and ABA-accredited schools were highly successful over the years with regard to African-Americans. No blacks were permitted even to be members of the ABA itself until 1943. *See* Boyd, *supra* n. 3, at 101; Brief of American Bar Association as Amicus Curiae to the 6th Cir. Court of Appeals at 3-4. And, until the Civil Rights Revolution of the late 1950s and early 1960s, there were few African-Americans in law schools, except for those in the few historically black law schools such as the Howard University

Law School. As late as 1971, at least 12 to 15 years after the beginning of the Civil Rights Revolution, and 17 years after *Brown v. Board of Education*, *total* minority enrollment in ABA law schools -- that is, total enrollment of blacks and all other minorities -- was *only about five percent*. The enrollment of women, who had also been discriminated against in earlier decades, was *less than ten percent*.[4]

C. Reliance on the LSAT by American Law Schools and by ABA Accreditors.

When the ABA and its Section of Legal Education, as well as many individual law schools, finally decided that it was necessary to reduce the exclusion of blacks and other minorities from law schools, and to attain diversity, they found it very difficult, indeed nearly impossible, to do so. For the accreditation criteria required by the ABA, including admissions criteria approved by the ABA and used by most law schools, made it extraordinarily difficult to attract *or to admit* blacks and other minorities to ABA schools.[5] For example, for

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[4]Percentages Derived from American Bar Association Data, <http://www.abanet.org/legaled/statistics/stats.html >(accessed Jan. 3, 2003).

[5] The LSAT has been shown to be a poor predictor of success in the *practice* of law. Chambers et al., *supra*; William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences In Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 Cal. L. Rev. 1055, 1101-1103, 1122 (2002)(citing Professor Lani Guinier's review of the Michigan alumni study: "The Michigan study, to the degree it can be generalized to other peer institutions, supports the position that law school admission criteria should be revamped. The authors found no relationship between LSAT/UGPA index scores and subsequent success in the legal

decades the LSAT was the *only* admissions test approved by the ABA accreditors, who also demanded that schools admit only students with scores sufficiently high to satisfy the accreditors. Yet even the accreditors themselves have long conceded that ABA law schools were placing "undue weight" on the LSAT, and that, because of the test's discriminatory impact, it should only be used in conjunction with non-numerical factors. Thus, the Section of Legal Education and the Law School Admissions Counsel issued cautionary statements ostensibly warning against misuse and/or over-reliance on the test. *See e.g.*, William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences In Educational Attainment?: A Study of Equally Achieving "Elite" College Students,* 89 Cal. L. Rev. 1055, 1064-1065 (1999), (discussing a report concluding that the vast majority of ABA-accredited law schools are using the LSAT inappropriately); William C. Kidder, *Portia Denied: Unmasking Gender Bias On the LSAT And Its Relationship To Racial Diversity In Legal Education*, 12 Yale J.L. & Feminism 1, 20-21 (2000); Eulius Simien, *The Law School Admission Test As A Barrier To Almost Twenty Years Of Affirmative Action*, 12 Thurgood Marshall L. Rev. 339 (1987). But, despite the ostensibly cautionary statements, the Section of Legal Education has failed to follow its own warning regarding use of the LSAT. The Section has continued to insist on use of the LSAT and on high LSAT scores, and this, combined with law

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profession, as measured by income or career satisfaction."); Lani Guinier, *Confirmative Action*, 25 Law & Soc. Inquiry 565 (2002). Even Linda Wightman, former director of research for the Law School Admissions Council, which sponsors the LSAT, has conceded the LSAT is only "valid for a limited use." Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1, 31 (1997).

schools' desire for an "elite" student body, causes the LSAT to be as influential and exclusionary a tool in law school admissions today as ever before.[6] (The exclusionary effect of the LSAT, and of other accreditation rules, has been extensively elaborated in an article by Professor George B. Shepherd of Emory University Law School. The article, entitled *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, is due to be published in *The Journal of Legal Education*, the "trade publication" of the legal academic world. (Copies are presently available from Professor Shepherd and from MSL; he has given MSL permission to provide the article to others.)

We note that the District Court opinion is replete with references to testimony by witnesses who confirmed that use of race-based admissions policies in law schools has been

[6]Recently, and yet again because of the exclusionary effect of the LSAT, the Section of Legal Education has proposed a rule under which the existing written rule would be changed to allow (unindentified) tests other than the LSAT to possibly become usable in place of the LSAT by a law school. However, especially because the exclusionary effects of the LSAT have been the subject of previous cautionary warnings which have caused no change in any accreditation practices or in schools' conduct, it remains to be seen whether this proposal for a change in the written rule will be adopted, will then be implemented *in practice* by the accreditors and the schools (as opposed to merely existing on paper), and will terminate the exclusion of minorities. *See* American Bar Association, Section of Legal Education and Admissions to the Bar, Proposed Amendments to Standard 503 and New Interpretations 503-1 and 503-2 (December 2002) available at: <http://www.abanet.org/legaled/standards/standards%20documents/standardsrevisions.pdf> (accessed Jan. 7, 2003).

necessitated by the schools' heavy reliance on numerical criteria, specifically the LSAT. *Grutter*, 137 F. Supp. 2d at 840-841. The record below, as well as other published studies, confirm that minorities' LSAT scores are consistently lower than those of non-minorities. Color-blind application of numerical criteria such as the LSAT would result in such a low proportion of minorities being admitted to law school that many schools, such as Michigan, have chosen to employ affirmative action programs to try to compensate for the racial discrepancies. *See e.g., Grutter*, 137 F. Supp. 2d at 833, 834, 837-9; Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race As A Factor In Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1 (1997); William C. Kidder, *The Rise of Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 Tex. J. Women & L. 167 (2000); Jason S. Marks, *Legally Blind? Reevaluating Law School Admissions at the Dawn of a New Century*, 29 J.C. & U.L. 111 (2002).

The importance of the LSAT to law school admissions cannot be overstated. It is fair to say that, academically, law schools insist that applicants have high undergraduate grade point averages and high scores on the LSAT, with the LSAT generally being the far more influential of the two requirements. In fact, because of the Section of Legal Education's insistence on use of and high scores on the LSAT, and because of law schools' widespread desire to be among the "elite," the LSAT has become virtually the *summum bonum* of law school admissions; it usually is *the* major factor that most schools rely on in making admissions decisions.[7] Most schools even use

[7]Law schools' continual efforts to be among the "elite" are directly counterproductive to diversity. Marks notes that the vast majority of schools whose entering classes are comprised of at least 10% African-Americans (considered by the author to be "race sensitive") are *not* among those deemed

arbitrary "cut off" scores -- in which the LSAT usually is *the* major factor -- and will not even consider admitting an applicant who is beneath the "cut off." *See* Preston C. Green, *Can Title VI Prevent Law Schools From Adopting Admissions Practices That Discriminate Against African Americans?* 24 S.U. L. Rev. 237, 239 (1997); Marks, 29 J.C. & U.L. at 131; William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences In Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 Cal. L. Rev. 1055, n. 41, 42 (2001) (Law School Admissions Council reported in 1999 that 90% of accredited law schools use a presumptive admit model based strictly on a statistical index score). And truly tiny differences in LSAT scores -- such as one or two point differences on a scale of 120 to 180 -- will settle a

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"elite" because of their selectivity or under rankings by U.S. News & World Report. Thus, it can fairly be said that elitism among our nation's law schools -- that is high selectivity measured by high LSAT and GPA scores-- trumps whatever desire these schools have to diversify. Simply stated, minority LSAT scores are generally so low that schools wishing to be considered "elite" cannot relax numerically dominated admissions standards sufficiently to make a significant dent in the racial disparity of entering classes. Marks, 29 J.C. & U.L. at 117-120. They therefore must turn to affirmative action to overcome the numerical problem.

We recognize that members of this Court and the Court's clerks are familiar with "elite" institutions that place a high premium on test scores. Yet, whether or not schools are "elite," it is imperative for them to use admissions processes that make sufficient room for minorities. This should not be prevented either by a desire for "elitism" or by accreditation rules.

person's fate adversely with regard to admission to a particular school or even *any* school. Persons with superior grade point averages are often turned down strictly because of their LSAT scores -- a fate that is distressingly common among African-Americans and other minorities.[8] Schools ignore traits necessary to success in law school and the practice of law, such as diligence, persistence, creativity, ability to write, ability to speak, ability to plan, and ability to work with people.

The District Court said, over the contrary claim of the University of Michigan's counsel, that the ABA does not require schools to use the LSAT, because the ABA's formal, written accreditation rules say only that applicants must take "an acceptable test." *Grutter*, 137 F. Supp. 2d at 870-71. In theory, the District Court may have been correct, but in practice, it was not. While the ABA's *formal written rules* do not require use of the LSAT, the ABA requires this *in practice*. No school that does not use the LSAT has ever been accredited. For

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[8] *See e.g.* William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences In Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 Cal. L. Rev. 1055, 1058, 1073-1074 (2001)(Racial gap of LSAT scores of white students, compared to students of color, significantly greater than GPAs for similarly situated college students); and William C. Kidder, *Portia Denied: Unmasking Gender Bias On the LSAT And Its Relationship To Racial Diversity In Legal Education*, 12 Yale J.L. & Feminism 1, 8-9 (2000) (Study revealed that more than *twice* as many African-Americans would be admitted to law school under a UGPA model as under a UGPA/LSAT model). Plainly, there is a need for institutions that serve competent "non-elite" students whose matriculation is currently prevented by rules employed by accreditors and schools. Rules of accreditation should not be allowed to block this, nor should schools' desires to be elite be allowed to block it.

decades it was *un*questionable that a school employing an admissions test other than the LSAT (or not using *any* standardized admissions test) could never hope to become accredited, and it remains at least *highly* questionable as to whether such a school can even *hope* to be accredited anytime in the future.

The District Court also said that the ABA does not require law schools to give LSAT scores any particular weight. *Grutter*, 137 F. Supp. 2d at 871. Again, while correct in theory because the formal rules of accreditation do not mandate any particular LSAT score, this conclusion is not accurate in fact. True, when it comes to schools like Michigan, whose students, minority and non-minority alike, all have high, or at minimum good, LSAT scores, the ABA accreditors do not care what students' scores are. But when it comes to schools which seek to provide legal education to minorities and the working class, who generally have lower LSAT scores than those of students at schools like Michigan, the ABA accreditors care very much about the students' LSAT scores. *See* John A. Sebert, *Accreditation Aids All Students*, National L.J. A21 (June 25, 2001). If the accreditors' regard the scores as too low, they will deny accreditation to a school, or will threaten disaccreditation if it previously was accredited. ABA accreditors recently revealed that they generally deny accreditation to schools whose students have an average of less than 143 on the LSAT. Since the average LSAT scores for African-Americans is 142, the accreditors' concern for the level of LSAT scores makes it very difficult, or actually impossible, for a school that wishes to extensively serve minorities to obtain accreditation. Shepherd, *supra* at 6, 24-25; *See* John A. Sebert, *Accreditation Aids All Students*, National L.J. A21 (June 25, 2001).

We note that there also are other practices which law schools and their accreditors insist upon but which also adversely affect the number of African-Americans who are able to enroll in law school. These practices are "input" rules that require, and measure a law school by whether it is inputting and

using, large amounts of expenditures and resources, rather than by whether it is teaching students the skills and techniques they need. These rules – which are being used although Congress unsuccessfully sought the elimination of input rules in its 1998 Amendments to the Higher Education Act[9] -- have driven the costs and tuitions of law schools so high that the average law school graduate now graduates with more than $84,000 in law school debt alone, with law school debt of $100,000 to $140,000 being reasonably common. These rules have raised the cost of legal education far beyond what can be afforded by minorities, immigrants, and working class persons.[10]

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[9] *See* 20 USC 1099(b), 2000 P.L. 105-244, 112 Stat. 1581; Senate Report No. 105-181 at 71 (1998).

[10] These exclusionary input rules are sometimes formal written ones, and sometimes are not written but rather are enforced informally and non-publicly in the accreditation process. The rules include ones that make it necessary for law schools to have very large, expensive full-time faculties, that severely limit the amount of teaching that full-time faculty members can be required to do, thereby forcing the hiring of yet more, and expensive, full-time faculty members, that inherently limit the use of far less expensive adjunct professors even if they are judges or other experts, that limit the amount of administrative work that full-time faculty members can do, thereby making it necessary to hire numerous assistant deans as well as large cadres of other expensive administrators, that force many schools to build new and elaborate buildings, now costing 40 to 60 million dollars, and that regulate the numbers of books, and the amount of very expensive physical space for seats, that a library must have. Rules such as these have caused the costs of providing legal education and law school tuitions to rise more percentage-wise and, because law school tuition started from a higher base, far more in absolute amounts, than tuitions in higher education generally. The input rules have,

D. The Failure of Race-Based Affirmative Action Policies.

Because many law schools still strive to maintain "elite" status by emphasizing high LSAT scores that are out of reach of most minorities, and by admitting only a small percentage of those that apply, there is yet another point of relevance. It is that race-based affirmative action demanded by the ABA and used by the University of Michigan has had only limited success in overcoming the effects of the racially exclusionary policies.

Today, after 30 years of race-based affirmative action, most American law schools are still not truly diverse. Thus, although the ABA regularly claims success because minorities of *all* types, including Asian-Americans, are now about 20 percent of the *collective* student bodies of *all* ABA schools, the fact remains that *African-Americans* are only about seven percent of the collective student bodies. Even more disturbing, they are even more sparse at a host of ABA schools, including many located in states with large African-American populations, while disproportionate percentages of African-American students are funneled into the historically black law schools.

At least 120 of the approximately 180 ABA-accredited schools remain largely white, with 75 of the 120 schools having African-American populations of zero percent to only four or five percent in 1998-99, after nearly 30 years of the ABA's version of affirmative action.[11] Such schools cannot be said to

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indeed, caused law school tuitions, now often ranging from $23,000 to over $30,000 annually, to rise to levels far beyond amounts that most minority persons, or most working class persons, can afford. The sheer cost discourages many minorities from applying to law school in the first place.

[11] Percentages derived from American Bar Association

be truly diverse. Moreover, many of these white schools are located in states with large African-American populations, such as New York, Pennsylvania, Virginia, Georgia, Florida, Louisiana, Kentucky, Ohio, Illinois, Missouri, Texas and California. *Id.* At the same time, the ABA's five historically black schools -- Howard, Southern, D.C. School of Law, Texas Southern and North Carolina Central -- have student bodies that are, respectively, 84.4 percent African-American, 66.2 percent African-American, 65.2 percent African-American, 58.5 percent African-American, and 45.4 percent African-American.

E. The American Law Schools' Continued Reliance on the LSAT (and Other Practices)That Creates the Need for Affirmative Action.

As discussed, many of the rules and practices of the ABA accreditors and of American law schools, including heavy reliance on the LSAT in the admissions process, and the elitist *weltanschauung* in legal education, have caused law schools to believe that race-based affirmative action policies are necessary to achieve diversity.

The District Judge was aware that the existing rules and practices have created the need for affirmative action. He thus said that "One . . . solution may be to relax, or even eliminate, reliance on the LSAT," especially since *"[t]he evidence presented at trial indicated that the LSAT predicts law school grades rather poorly . . . and that it does not predict success in the legal profession at all."* *Grutter*, 137 F. Supp. 2d at 870 (emphasis added). Thus, he said, if the Michigan Law School seeks students who are likely to succeed in law school and the legal profession, "one must wonder why the law school concerns itself at all with an applicant's LSAT score." *Id.* He

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Data, http://www.abanet.org/legaled/statistics/stats.html (accessed January 3, 2003).

also pointed out that race-neutral alternatives were available, including, among others, "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores," *Grutter*, 137 F. Supp. 2d at 852-53, and he made explicit that there had been no testimony "as to whether the University of Michigan Law School has considered reducing its reliance on the LSAT or whether it has considered challenging the ABA's requirement that applicants take "an acceptable test." *Grutter*, 137 F. Supp. 2d at 871, n. 63.

The District Judge went on to suggest several different approaches that the University of Michigan Law School could use to increase diversity without considering race in admissions. One of the alternative admissions methods suggested by the District Judge - - automatically admitting given percentages of graduates from certain colleges and universities - - has been adopted by state *university* systems in Texas, Florida, and California when admitting graduates of high schools.[12] *Grutter*, 137 F. Supp. 2d at 853; Jim Yardley, *Desperately Seeking Diversity*, N.Y. Times, A28 (Apr. 14, 2002). And, in addition to such automatic admissions, California universities recently were able to increase the number of minority students and diversity, without consideration of race, by using a (more holistic) "comprehensive review" of individual applicants, not a "by-the-numbers" approach, and by increasing recruiting and outreach efforts. Barbara Whitaker, *Admission Up For Minorities in California*, N.Y. Times A25 (Apr. 7, 2002). A holistic, non-LSAT-driven approach, we note, is a very logical alternative for law schools to use.[13] In any event, suffice it to

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[12]The problem with these programs, notes one commentator, is that they are not in effect in law or other graduate schools. Kidder, 89 Cal. L.Rev. at 1062-1064.

[13]A holistic admissions approach, which would require an in-depth examination of individual applicants (as is done by various medical schools), would increase the admissions workloads of law schools. Marks, 29 J.C. & U.L. at 150. Law schools' unwillingness to expend more effort on admissions is yet another reason they have relied heavily on the LSAT in the past.

For an excellent, brief discussion of the desirability of using a holistic rather than a numbers-driven process in higher education, *see* the January 14, 2003 *op ed* column in *The New York Times* by Leon Botstein, the well known conductor and President of Bard College. Botstein, *The Merit Myth*, N.Y. Times A31 (January 14, 2002).

say here that schools can develop appropriate admissions policies to obtain diversity if the use of race based affirmative action is struck down.

CONCLUSION

MSL takes no side on the issues before the Court. However, we believe that the information presented here can appropriately be used by the Court in deciding whether there is a compelling state interest in using race-based affirmative action to improve minority representation in American law schools and in determining whether race-based affirmative action is a remedy tailored to achieve this goal.

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